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Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1987

ROBERT G. CORACE, JR.,
Petitioner

- *v* -

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ROGER H. LEEMIS
Suite 2500—Onyx Plaza
29777 Telegraph Rd.
Southfield, Michigan 48034
(313) 353-5060

Counsel of Record
for Petitioner

November 16, 1987

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QUESTIONS PRESENTED FOR REVIEW

1. Is a probationer denied due process of law for lack of sufficient notice of the alleged violations of probation when he appears for what should have been a hearing on modification of *one* of the terms of probation, but is then told for the first time that he is being charged with violating *three* of the terms of his probation?

2. Is a probationer denied due process of law by the admission at a probation revocation hearing of evidence including single and double hearsay and fragments of letters read into the record, where no attempt was made to show good cause for denying confrontation and cross-examination and the evidence bore no indicia of reliability, contrary to the decisions of this Court and other circuits?

3. Is it consistent with due process for a probationer to be charged with violating a condition of probation requiring obedience to "instructions" of a probation officer where the probation officer has imposed requirements on that probationer, including that the probationer change his state of domicile, without there first having been sought a modification of the conditions of probation originally imposed by the sentencing court?

LIST OF PARTIES

The parties to the proceedings below were the petitioner, Robert G. Corace, Jr., and the respondent, United States of America.

Since petitioner is an individual, and since his corporate co-defendants in the original criminal prosecution were not parties to the probation revocation proceedings at issue here, no Rule 28.1 list is afforded.

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UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Robert G. Corace, Jr., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled proceeding on August 6, 1987.

OPINIONS BELOW

There is no reported decision by the Court of Appeals for the Sixth Circuit. An order was entered, without opinion, based upon the disposition by the panel in open court pursuant to Sixth Circuit Local Rule 19. The judgment and a transcription of the presiding judge's statement below are reprinted in the appendix hereto.

The decision of the United States District Court for the Eastern District of Michigan (Cook, D. J.), has not been reported. Copies of the opinion of the District Judge as stated in the record at the close of the probation revocation hearing and the order dated June 27, 1987 and entered on the docket July 3, 1986 are reprinted in the appendix hereto.

JURISDICTION

Probation revocation proceedings were commenced by a Petition for Probation Action dated June 19, 1986 and signed by the Chief Probation Officer of the Eastern District of Michigan. See appendix, infra at 12. By order endorsed thereon,

also dated June 19, 1986, a probation revocation hearing was scheduled for Monday, June 23, 1986.

On June 23, 1986, at the conclusion of the probation revocation hearing, the District Judge determined that petitioner had violated conditions of his probation and that probation should be revoked. An order to that effect was entered on the docket on July 3, 1986. July 14, 1986, petitioner filed a motion for new trial and motion for reconsideration. By order docketed September 8, 1986, those motions were denied.

On petitioner's appeal, the Court of Appeals for the Sixth Circuit entered an order on August 6, 1987 affirming the district court's revocation of petitioner's probation. Petitioner then timely (pursuant to extension granted) filed in the Sixth Circuit a Petition for Rehearing and Suggestion for Rehearing *En Banc*. By order entered September 18, 1987 the petition for rehearing was denied.

The jurisdiction of this Court to review the order of the Sixth Circuit is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND RULE INVOLVED

The Fifth Amendment to the U.S. Constitution provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

Federal Rule of Criminal Procedure 32.1 in pertinent[1] part provides:

> **Rule 32.1 Revocation or Modification of Probation**
>
> **(a) Revocation of Probation.**
>
> **(1) Preliminary hearing.** Whenever a probationer is held in custody on the ground that he has violated a condition of his probation, he shall be afforded a prompt hearing . . . . [Provisions controlling the probable cause hearing are omitted.]

[1]Subrule (b) was amended effective December 10, 1986, Pub. L. No. 99-646, §12(b), to provide for the government's right to object to "favorable" modifications, not at issue here.

(2) Revocation Hearing. The revocation hearing, unless waived by the probationer, shall be held within a reasonable time in the district of probation jurisdiction. The probationer shall be given

(A) written notice of the alleged violation of probation;

(B) disclosure of the evidence against him;

(C) an opportunity to appear and to present evidence in his own behalf;

(D) the opportunity to question witnesses against him; and

(E) notice of his right to be represented by counsel.

(b) Modification of Probation. A hearing and assistance of counsel are required before the terms or conditions of probation can be modified, unless the relief to be granted to probationer upon his request or the court's own motion is favorable to him, and the attorney for the government, after having been given notice of the proposed relief and a reasonable opportunity to object, has not objected. An extension of the term of probation is not favorable to the probationer for the purposes of this rule.

STATEMENT OF THE CASE

This petition arises out of the revocation of petitioner's probation, pursuant to 18 U.S.C. § 3653 (since repealed, Pub. L. No. 98-473).

Petitioner Robert G. Corace, Jr. had been convicted on an indictment charging "mail fraud", 18 U.S.C. § 1341, and "false swearing", 18 U.S.C. § 1001, arising out of the sale of crude oil at fair market value in excess of the controlled price for so-called "upper tier" oil.[2]

Petitioner, together with four corporations not parties here, had been indicted in the Eastern District of Michigan on July

[2]The Emergency Petroleum Allocation Act regulations which supply the governmental interest involved had expired by the time petitioner was released from prison.

31, 1984. The indictment charged that the corporations and petitioner, their chief operating officer, violated then-applicable regulations under the Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159; 87 Stat 627, by selling domestic crude oil at fair market value, in excess of the maximum permitted price. The use of the mails to falsely certify that crude oil as "stripper" oil was alleged as establishing mail fraud and false swearing.

Petitioner was sentenced under 18 U.S.C. § 3651 to six months in the custody of the attorney general, to be followed by a thirty-six month probation period. Petitioner was released from the federal prison camp, Duluth, Minnesota, October 18, 1985, having earned the maximum credit for "good time".

Immediately upon his release, petitioner returned to Miami, Florida, pursuant to transportation arranged by the Bureau of Prisons. Petitioner had been a resident in, and a domiciliary of, the state of Florida since 1980. His return to Miami was with the consent of his probation officer and was consistent with petitioner's wishes. It is undisputed in these proceedings that petitioner was and at all relevant times had been a resident and domiciliary of Florida.

The District Judge had imposed eight conditions of probation upon petitioner. In relevant part, these included:

* * *

> (3) You shall work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. When out of work you shall notify your probation officer at once. You shall consult him prior to job changes.
>
> * * *
>
> (4) You shall not leave the judicial district without permission of the probation officer.
>
> * * *
>
> (6) You shall follow the probation officer's instructions.

Upon his release, probationer had been instructed to report immediately upon arrival to the probation officer in Florida.

Petitioner did so. Though petitioner was merely returning to the district of his residence, the Florida probation office took the position that it was free to accept or reject supervision of petitioner as a matter of "courtesy".[3] Thus, the Florida probation officers, acting on their assumption that they were empowered to withhold courtesy supervision, attempted to impose upon petitioner a number of reporting requirements, considerably more onerous then these imposed by the conditions of probation, and also exceeding the disclosures required in the monthly reports filed by petitioner. Petitioner respectfully objected to those additional burdens, expressed his position that he saw no purpose therefore and disputed the authority of the probation officers to in practice expand upon conditions of his probation without amendment of those conditions by the District Judge.

Petitioner also complained of the impositions and of the position being taken by the Florida probation officers to petitioner's probation officer, Raymond Frank, chief probation officer for the Eastern District of Michigan. A series of communications ensued, including correspondence from petitioner to Mr. Frank and, apparently, communications between Mr. Frank and the Florida probation officers (Messrs. Miklic and Rodriguez). At Mr. Frank's request, petitioner made further efforts, in April, 1986, to resolve these disputes. Ultimately, however, these efforts were fruitless.

The Florida probation officers advised petitioner that they were withdrawing supervision of him and instructing him to "return [sic] to the Eastern District of Michigan". That is, consistent with their position that petitioner was present in Florida as a matter of grace under "courtesy" supervision, the Florida probation officers perceived their declining of supervision to require petitioner's "return" to Michigan.

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[3]No specific authority for that proposition was cited. Research has disclosed that Probation Manual provisions which authorize an office to decline supervision relate to *transfers* of probationers from one district to another, as discussed in Section III, *infra*. *See* 18 U.S.C. § 3653.

Thereafter, petitioner brought these disputes directly to the attention of the sentencing judge in the Eastern District of Michigan. Petitioner explained at length in a letter to the judge dated June 5, 1986 why he believed the Florida probation officers' actions were unreasonable and without authority and expressed his willingness to appear at a hearing to adjudicate the question of his residence. A hearing was in fact held on June 23, 1986.

On or about June 19, 1986, a Petition and Order for Probation Action (Probation Form 12) was signed by Mr. Frank and also by the District Judge (ultimately docketed July 3, 1986) for the purpose of setting the hearing. It set forth three alleged violations of petitioner's probation. Petitioner had no prior notice of its issuance or execution. See appendix, infra at 12.

To the date of the hearing, petitioner had never been advised either that his conduct would be claimed to be a violation of the conditions of his probation; or that his refusal to follow various directives of the Florida probation officers would be the basis for any action other than a withdrawal of "courtesy supervision" of petitioner by the Florida probation office, alleged to require his "return" to Michigan. In other words, to the point he arrived in Detroit, Michigan to attend a hearing, petitioner reasonably believed that the only issue presented was whether he could be required to return to Michigan because the Florida probation office had withdrawn supervision of him.

However, at the hearing, petitioner was for the first time advised he was being charged with violations of three conditions of probation, as set forth in the Petition for Probation Action. The alleged violations were of: Condition 3) "You shall work regularly at a lawful occupation . . . ."; Condition 4) "You shall not leave the judicial district without permission of the probation officer."; and Condition 6: "You shall follow the probation officer's instructions." Even though the charged violation of Condition 4 was at least related to the issue of residency, this still constituted the first time that petitioner was notified that it was deemed by the probation officers to

be a violation of probation, not merely a basis for declining supervision in Florida. As to the other two charges, petitioner had had no indication whatsoever that they would be addressed at the hearing.

The only witness who testified at the hearing was Mr. Frank. The testimony he offered, over objection, was based upon telephone conversations Mr. Frank had had with the Florida probation officers. These constituted both single hearsay (what the probation officers told Mr. Frank) and double hearsay (what the probation officers reported others had said). Mr. Frank also testified based on excerpts from a letter, or letters, he had received from the Florida probation office also setting forth hearsay. Neither the form nor contents had previously been provided petitioner. Despite these objection, excerpts were read into the record; the entire letter was not admitted. There was no attempt to show why the government should be excused from producing the witnesses.

The substance of the largely conclusory testimony offered by the government included that one of the Florida probation officers had originally been unable to locate petitioner's boat (wherein he resided) at a marina, and that the slip was leased in the name of an individual other than petitioner. It was also alleged the probation officers concluded and conveyed to Mr. Frank that petitioner could not verify his employment because he declined to supply a financial statement and a "daily log" beyond the monthly reports required of him (and which he did provide). Finally, testimony was offered that petitioner had been referred to and directed to attend a "job placement service" obtained by the Florida probation office.

On cross-examination, Mr. Frank admitted: petitioner had always been respectful in his dealings with Mr. Frank; there was never any question that petitioner had regularly reported whenever required by the probation office; petitioner had never refused to make the monthly reports required by him, had made those reports so long as the Florida officers would accept them, and that such reports disclosed petitioner *was* employed and where; there was no evidence that the Florida probation officers had ever inquired as to whether petitioner was employed

where he said he was, nor was there any reason for Mr. Frank to believe petitioner was not so employed; that petitioner had maintained that the probation officer had erred in the inquiry at the marina and had requested that information be re-checked, but Mr. Frank had received no report as a result of such recheck, if any had ever been made. Also, though Mr. Frank had previously spoken with at least one of petitioner's children (known to visit petitioner in Florida), no attempt had ever been made to confirm his residence with or through them.

Further, Mr. Frank conceded that the sole written notice or warning to petitioner in regard to the Florida probation office's demands was that if he did not accede thereto, he would be ordered to return to Michigan. Mr. Frank could not say that petitioner was ever told orally that failure to comply with those demands would be deemed a violation of conditions of probation, rather than merely a basis for declining courtesy supervision. Mr. Frank also acknowledged his consent and permission for petitioner to return to Florida upon release from prison.

After hearing testimony, the district court adjudged petitioner not guilty of the second charge (Condition 4) regarding "leaving the judicial district". However, the district judge did find petitioner guilty of the first charge (Condition 3), regarding "working regularly at a lawful occupation" and also of the third charge (Condition 6), that he "follow the probation officer's instructions". The court based its findings upon its determination that:

> [Petitioner] has failed to provide . . . information or documentation . . . . [and] no evidence that if Mr. Corace is out of work, that he has notified his probation officer . . . . (See Appendix infra at 9.)

As to the charge of failing to follow the probation officer's instructions, the court found a violation based upon a specific failure of petitioner to contact a job placement office and to "maintain a log of his daily activities", both as directed by the Florida probation officers.

In terms of the sanction to be imposed, the district judge conceded that "[o]rdinarily, the offenses would not warrant

the sentence that is being imposed . . . ." However, apparently based upon perceived "defiance" by petitioner based upon his refusal to relocate to Michigan (the very charge on which the district judge had just adjudged petitioner not guilty), the district judge imposed a sentence requiring petitioner to serve the balance of his original two-year sentence. Appendix, infra at 11.

Thereafter, petitioner timely filed a motion for new trial under Fed R Crim P 33 and for reconsideration. In support thereof, petitioner supplied specific information which had not been available to him at the time of the original hearing, due to the surprise created by the lack of prior notice of the charges brought against him. Most importantly, petitioner related the results of his inquiries after the revocation hearing with the person who had operated the job placement service. That person had advised him that there had never been openings for persons such as petitioner[4]; that the job placement service had an unsatisfactory record in terms of placing white collar probationers; and that a result, the job placement service had been discontinued at the end of June, 1986, essentially contemporaneous with the revocation hearing.

September 4, 1986, the trial court signed an Order denying the motion for new trial and for reconsideration. On September 15, 1986, petitioner filed a notice of appeal.

The appeal was briefed and argued before a panel of the Court of Appeals for the Sixth Circuit. At the conclusion of oral argument, pursuant to Sixth Circuit Rule 19, the presiding judge announced the panel's conclusion:

> . . . that there is no error in the decision of the district court, that defendant was guilty of refusing to document employment and refusing to follow the probation officer's instructions. There was a basis upon which to revoke probation and we find no abuse of discretion in the court revoking it. The judgment of the district court is upheld.

[4]Petitioner is an attorney licensed in Michigan. He was suspended from practice due to the underlying conviction.

Thereafter, a timely (upon extension granted) petition for rehearing and suggestion for rehearing *en banc* were filed. By Order entered September 18, 1987, that petition was denied. This petition for a writ of *certiorari* follows.

REASONS FOR GRANTING THE WRIT

I.

The Sixth Circuit, in permitting a Probation Revocation Hearing to be held without adequate notice to Petitioner, has acted in conflict with decisions of this Court.

Almost fifteen years ago, this Court settled the proposition that probationers have due process rights in revocation proceedings. *Gagnon* v *Scarpelli*, 411 U.S. 778 (1973); *Morrissey* v *Brewer*, 408 U.S. 471 (1972).

Those rights were in 1979 set forth in a new Rule of Criminal Procedure 32.1, which, among other things, governs the conduct of a revocation hearing. It provides in pertinent part:

> (a) (2) Revocation Hearing. The revocation hearing, unless waived by the probationer, shall be held within a reasonable time in the district of probation jurisdiction. The probationer shall be given
>
> (A) written notice of the alleged violation or probation;
>
> (B) disclosure of the evidence against him;
>
> (C) an opportunity to appear and to present evidence in his own behalf;
>
> (D) the opportunity to question witnesses against him; and
>
> (E) notice of his right to be represented by counsel.
>
> * * *
>
> (b) Modification of Probation. A hearing . . . [is] required before the terms or conditions of probation can be modified, unless the relief . . . granted . . . probationer . . . is favorable to him . . . .
>
> * * *

F R Crim P 32.1. These are among the " 'minimum require-

ments of due process' " enumerated in *Scarpelli*, 411 U.S. at 786.

In this case, petitioner was not even advised that the hearing (for which he was voluntarily appearing) would have as its purpose the revocation of his release rather than merely the modification of a condition of probation. Indeed, by petitioner's letter to the district court, he expressed his belief that he had reached an impasse with a Florida probation officer and, with regard to his refusal to change his domicile, volunteered for a hearing on this issue, if necessary. At that point, both petitioner and (apparently) various probation officers in Florida and Detroit, had stated the issue as whether petitioner could be required to depart Florida, on withdrawal of "courtesy" supervision.

To that point, certainly, there is no doubt petitioner believed the issue of whether he could continue to reside in Florida to be the only issue presented. That had also been the position, to that point, of the various probation officers. That being the case, the hearing was intended, or should have been conducted, as a "modification hearing" under F R Crim P 32.1(b) and *not* as a "revocation hearing" under Rule 32.1(a)(2). Proceeding to revoke petitioner's probation denied him due process and was clear error.

The distinction is substantial; as the Advisory Committee Comment points out:

> Rule 32.1(b). Subdivision (b) concerns proceedings on modification of probation (as provided for in 18 U.S.C. 3651). The probationer should have the right to apply to the sentencing court for a clarification or change of conditions. * * * This avenue is important for two reasons: (1) *the probationer should be able to obtain resolution of a dispute* over an ambiguous term or the meaning of a condition without first having to violate it; and (2) in *cases of* neglect, overwork, or *simply unreasonableness on the part of the probation officer*, the probationer should have recourse to the sentencing court when a condition needs clarification or modification.

Notes to Rule 32.1. Advisory Committee on Rules, *reprinted in* Title 18 USCA, Rules 32-42, 1987 Supp at 62-63 (emphasis added).

Only at the hearing, did petitioner receive for the first time formal written notice advising him of the alleged violations, including two charges wholly beyond the issue of his continued domicile in Florida. *See* appendix *infra* at 12. Thus, the lack of notice of the other two issues assumed critical importance as those were the matters upon which the court had concluded he had violated probation; petitioner was found not guilty, on the one issue of which he was aware.

Petitioner was seriously disadvantaged by his lack of notice, lack of preparation and an opportunity to defend. There were facts material to petitioner's defense, which could not be brought out at that hearing. Petitioner was harshly penalized for his non-compliance with what was characterized as a probation officer's "instruction" to contact a job placement office. His refusal to follow that so-called instruction was accepted by the district court as sufficient justification for requiring the maintenance of an employment log and as the basis for concluding *petitioner* failed to meet the burden of proving he *was* employed. However, as petitioner subsequently learned, contact with the job placement office would have been a futile and hollow gesture. Inquiry showed that the job placement office had never had opportunities for professionals and that the placement service itself had disbanded within a week of the revocation hearing because it was ineffective.

This case provides an opportunity to clarify the difference between the supervisory and punitory aspects of probation. This Court has recognized the rehabilitative purpose of probation. *See Scarpelli*, 411 U.S. at 784-785. Probationers should be confident that they may bring to the sentencing court a *bona fide* problem of probation office supervision. It undermines the shared goal of rehabilitation when a probationer who appears for what should have been at most a hearing on modification suddenly finds that he faces loss of liberty for charges never before communicated to him.

The Sixth Circuit's conclusion that there "was a basis upon which to revoke probation and we find no abuse of discretion . . ." also discloses that the Court of Appeals appears to have harkened back to the *Escoe* v *Zerbst*, 295 U.S. 490, 492 (1935) dictum that probation is merely an "act of grace". This illustrates a reluctance to afford petitioner the rights guaranteed by *Scarpelli* and *Morrissey*, as codified in Rule 32.1.

For these reasons, this Court should exercise its power of supervision by way of review on writ of certiorari.

II.

The admission of single and double hearsay and fragments of letters, contrary to decisions of this Court and of other Circuits, deprived petitioner of due process.

A. Petitioner was denied confrontation and cross-examination.

The government's only witness at the probation revocation hearing was the chief probation officer from Detroit who had no personal direct competent knowledge of most of the matters introduced in evidence at the probation hearing. Those factual matters would have been within the personal knowledge of Messrs. Rodriguez and Miklic, the *Florida* probation officers. However, no attempt was made to show, nor was the district court requested to find, good cause for excusing the absence of Rodiguez and Miklic. Instead, their unsworn statements were spread on the record out of the mouth of Mr. Frank. As a result, petitioner was denied the opportunity to confront and cross-examine the witnesses against him.

Mr. Frank testified over objection as to conversations between himself and Messrs. Rodriguez and Miklic. Some of that testimony was quotation, and some paraphrasing. Furthermore, some of the assertions spread on the record were double hearsay, repetitions of what the Florida probation officers had assertedly been told by unnamed third persons.

The other evidentary basis was excerpts of a letter dated February 6, 1986; neither that letter nor any of its contents

had previously been provided petitioner. The district court permitted Mr. Frank to testify to a portion of the contents of that letter, rather than offering it into evidence. Indeed, it was unclear at the hearing whether one or two letters were excerpted in this fashion.

The issue thus presented is whether, under the circumstances of this case, the admission of single and double hearsay and excerpts or fragments of one or more letters denied petitioner due process of law.

Petitioner recognizes that (except for the assertion of privilege, not at issue here), the Federal Rules of Evidence do not apply to revocation hearings. FRE 1101(d)(3). The question remains: what standards should apply to the government's attempt to admit evidence such as that presented against petitioner. Rule 1101(d)(3) does not stand as authority for an "evidentary free for all"; instead, by its terms, FRE 1101(d)(3) merely declines to apply the full panoply of procedures set forth in the Federal Rules of Evidence to probation revocation proceedings.

Through recognizing the greater evidentiary flexibility in such proceedings, the due process requirements of *Morrissey* and *Scarpelli* grant a probationer both the right to confrontation of witnesses against him, and to be adjudged only on competent and reliable evidence. *Scarpelli* referred to the "use *where appropriate* of the *conventional* substitutes for live testimony . . . ." 411 U.S. at 783 n 5 (emphasis added).

With the promulgation of F R Crim P 32.1, these evidentary standards were promulgated as follows: that there be "disclosure of the evidence against him"; and the "opportunity to question witneses against him". F R Crim P 32.1(a)(2)(B), (D).

Seen in the light of both *Scarpelli* and Rule 32.1, the district court's acceptance of the proffered hearsay and letter fragments violated petitioner's rights. Competent evidence was never made of record for purposes of the hearing. Instead, purportedly factual assertions of the Florida probation officers or of the unnamed individuals who may have made factual assertions (as opposed to opinions and conclusions), have

passed through one or more stages of hearsay, then been further altered when paraphrased as spread upon the record. In the same sense, assertions made in the February 6 letter were excerpted and paraphrased.

Not only was petitioner not able to question the Florida probation officers and other unnamed "witnesses" (declarants to the Florida officers) against him, they were not even present.[5] Instead, their unsworn assertions, or opinions, were spread on the record to petitioner's detriment. Indeed, in the case of the fragments from the one or two letters, petitioner was even denied the benefit that context might have provided.

Apart from the specific requirements of F R Crim P 32.1, the admission of that evidence was fundamentally contrary to petitioner's fifth amendment rights and to the foundations of the common law. Indeed, the right of cross-examination is not an invention of the common law. The story of Susanna and the Elders in the *Apocrypha* provides a salutary example from Biblical times: there, Susanna was falsely accused by two elders of adultery. She was about to be condemned to death until the young Daniel separated the witnesses and questioned each about the kind of tree under which she had allegedly lain. When their answers differed, the lie was exposed.

Also, the long-standing common law rule of completeness would have required, in any event, and quite apart from its hearsay nature, that the entire text of the subject letter be admitted. *See* McCormick, Evidence at 130 (2d ed. 1972); Wigmore, *Code of the Rules of Evidence*, Section 2040 (2d ed. 1935).

B. The decision conflicts with the developing law in other circuits.

Since *Scarpelli*, and especially since the adoption of Rule 32.1, courts have grappled with the question of when hearsay must

[5]All of this occurred without any attempt to excuse non-production of the witnesses, nor was any record made on that point. That alone would appear to require reversal. *See Ponte* v *Real*, 471 U.S. 491, 496-499 (1985).

be excluded, without reaching a uniform decision. At least one court has allowed the receipt of a letter (apparently in its entirety) from a Salvation Army center to establish *prima facie* the petitioner's use of marijuana. *See, U.S.* v *McCallum*, 677 F2d 1024 (CA 4 1982). On the other hand, another court has held hearsay inadmissable in a similar case. *U.S.* v *Cain*, 615 F2d 380 (CA 5 1980). Petitioner is aware of no decision which has allowed fragments of letters containing single and double hearsay to be read into the record over objection, much less where the information contained therein was the primary basis for a probation revocation.

Other circuits have attempted to develop standards for a court which "specifically finds good cause for not allowing confrontation". *Morrissey*, 408 U.S. at 489. The Eight Circuit concluded that:

> First, the court should assess the explanation the government offers of why confrontation is undesirable or impractical. For example, the government might contend that live testimony would pose a danger of physical harm to a government informant . . . or, as suggested by *Gagnon*, that procuring live witnesses would be difficult or expensive.
>
> A second factor that must be considered, and one that has been focused upon by a number of courts, is the reliability of the evidence which the government offers in place of live testimony. [Citations omitted.] Thus, where the government demonstrates that the burden of producing live testimony would be inordinate and offers in its place hearsay evidence that is demonstrably reliable, it has made a strong showing of good cause. *Where, on the other hand, the government neither shows that presenting live testimony would be unreasonably burdensome nor offers hearsay evidence that bears indicia of reliability, the probationer is entitled to confrontation.*

U.S. v *Bell*, 785 F2d 640, 643 (CA 8 1986) (emphasis added). Arguably, the plain language of Rule 32.1(a)(2)(D) does not authorize courts to excuse confrontation and cross-examination. But at least the *Bell* court has articulated a procedure

which recognizes a probationer's right to due process. *See also U.S.* v *Penn*, 721 F 2d 762, 764-766 (CA 11 1983). Hearsay lab reports were admitted to establish drug use. The court recognized there must be a balancing of a probationer's rights against whatever good cause the government offered. Cases from the Fourth, Seventh, Eighth and Ninth Circuits relying on "indicia of reliability" were reviewed.

Here, on the contrary, the government made no effort on any ground, not even simple expediency, to justify avoiding production of adverse witnesses. Further, given the facts of the present case, and even conceding expediency, the record makes clear that the evidence offered could not be "demonstrably reliable". It is one thing to admit, in its entirety, a written report of one who is not then in an adversarial relationship with a probationer; it is quite another thing to allow a witness to read and paraphrase pieces of letters from, and repeat hearsay statements of, a probation officer. This is especially improper when such statements and assertions were made *after* the Florida probation officer's authority had been challenged; where the out of court declarant was in actual conflict with the probationer, actively seeking to have his release revoked; and where the repetition of the hearsay statements and report are on their face incomplete and unbalanced and raise more questions than they answer. Indeed, the communications which were made were apparently made with the express purpose of causing petitioner's probation to be revoked.[6] Their adversarial nature precludes reliability.

This case is even beyond the Sixth Circuit's holding in *Taylor* v *Parole Commission*, 734 F2d 1152 (CA 6 1984). There, at least the letter at issue was admitted in its entirety. In addition, the recitals of the *Taylor* letter were a dispassionate summary of proceedings in a state criminal matter, based on a

[6]See Probation Manual, Vol X, ¶5209; which recommends the problem of absent witnesses be avoided by "transfer [of] jurisdiction to the district where the violation occurred because the probationer, witnesses, and evidence . . . . are located there."

review of the state court file. Here, on the other hand, the absent declarants were personally involved, had a stake in the outcome and the statements bore no independent indicia of reliability.

Circuit courts have been determining, on a case by case basis, what evidentiary standards should apply and when cross-examination can be dispensed with in revocation hearings. The Eighth Circuit, in *Bell*, has proposed a two-part test consistent with *Scarpelli* and which finds support in other circuits. The decision of the Sixth Circuit here is in conflict with the decision in *Bell*. This Court should clarify both what constitute "conventional", or constitutionally acceptable, evidentiary substitutes, and what limits exist on the resort to "conventional substitutes" for live testimony.

III.

Reliance on directives which were not properly "the probation officer's instructions" was grossly improper and denied petitioner due process of law.

The third alleged violation charged against petitioner that he was to "follow the probation officer's instructions", was in fact also the basis for the other two alleged violations: that of condition 3 ("work regularly at a lawful occupation . . . .") and condition 4 (that he "not leave the judicial district without permission"). That is, it was charged that he "left" the judicial district by failing to go to Michigan as directed.

Likewise, petitioner's refusal to disclose various information beyond that required in his monthly reports apparently led the probation officers to conclude that he must not be working. This led to the probation officer's directives to contact a job placement officer and to maintain a detailed log of daily activities far beyond the requirements of his monthly report.

Because the terms of probation were never amended, the issue is whether such directives, standing alone, which expand upon the stated condition of probation can create a violation

of those conditions when a probationer reasonably refuses to accede to those directives.

The alleged violation of condition 4 ("you shall not leave the judicial district without permission . . . .") would ordinarily be of no concern here because the district judge found no violation of condition number 4 and the government did not pursue an appeal. However, it remains an issue for two reasons: first, the district judge found and adjudged petitioner not guilty for violation of probation condition 4 but then characterized petitioner's "resistence" as being "defiance" and revoked probation, imposing the entire balance of the original sentence, even though petitioner had communicated the impasse to both Mr. Frank, in Detroit, and to the sentencing judge.

Since the entire prior focus of petitioner's conduct had been on the probation officer's threat to require him to "return" to Michigan, it appears that even though adjudged not guilty, petitioner's successful challenge of the probation officer's unlawful directive was held against him. The probation officers incorrectly assumed that they could, as a matter of grace, withhold supervision over petitioner. That was the assumption upon which they founded their claimed right to impose additional directives, beyond the conditions of probation imposed at sentencing by the District Court. In the first place, the probation officers erred in their conclusion that they were entitled to withhold supervision. Concededly, if the court's jurisdiction over a probationer is to be transferred, that transfer is undertaken only after investigation and with the consent of the court which will assume jurisdiction. *See* 18 U.S.C. § 3653. However, such was not case here: jurisdiction over petitioner remained in the District Court for the Eastern District of Michigan, and he remained at all relevant times a resident and domiciliary of Florida. The reliance by the Florida probation officers on "courtesy supervision" was inapposite since under these circumstances the Florida office was required to accept supervision. *See*, *Probation Manual, Guide to Judiciary Policies and Procedures*, Vol X ¶5003 (Administrative Office of U.S. Courts, GPO 1985).

Through proclaimed to be the probation officer's "instructions", petitioner was never advised that failure to accede thereto would be anything other than a basis for the probation officer in Florida to withdraw so-called "courtesy supervision". Petitioner was expressly never advised that they would form the basis for an independent revocation proceeding. This not only shows the injustice of basing his revocation thereon, but also further establishes petitioner's reasonable belief that the hearing at which he voluntarily appeared was no more than a hearing to consider amendment of the conditions of probation.

Prior sections have pointed out defects in the proceedings. Petitioner maintains there was not evidence to sustain the revocation, especially if the directives cannot substitute for conditions of probation.

In this case, however, directives were used to establish petitioner's alleged violations. In so doing, the probation system has failed petitioner. It has denied him appropriate notice of the conduct claimed to be proscribed. The probation officer has failed whenever instruction and guidance might have avoided the violation. The probation officer's failure is of far greater magnitude, when it is his failure to advise the probationer which leads to the probationer being unfairly misled to his detriment.

The district court also failed to discharge its obligation to supervise the conduct of the probation officers by failing to address this matter. A significant percentage of probationers are each year returned to prison for so-called "technical" violations.[7] Many of these may be of the same tenor as here; ones which better and more diligent communication on the part of the probation officer of what was desired versus what was required, could have avoided.

---

[7]For the twelve month period ending June 30, 1986, almost twice as many individuals were "removed from supervision" by the Federal probation system for "technical" violations as for commission of a new major offense. Annual Report, Director of the Administrative Office of U.S. Courts at 324 (1986).

Thus, this Court should affirm that: 1) probationers may only be held to have violated instructions based upon the instructions themselves without bolstering by directives; and that 2) before probation could be revoked, there must first have been an amendment to the conditions of probation so as to give the probationer fair warning of the conduct proscribed.

CONCLUSION

For the reasons presented herein, this petition for certiorari should be granted.

Respectfully submitted,

ROGER H. LEEMIS
29777 Telegraph Road, Suite 2500
Southfield, Michigan 48034
(313) 353-5060

November 16, 1987

Appendix

No. 86-1879

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee

vs.

Robert G. Corace, Jr.,
Defendant-Appellant

ORDER

Before: KENNEDY and NELSON, Circuit Judges; CELEBREZZE, Senior Circuit Judge

This cause having come on to be heard upon the record, the briefs and the oral argument of the parties, and upon due consideration thereof,

It is **ORDERED** that the judgment of the district court be, and it hereby is, **affirmed** upon the opinion of the district court.

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk

/s/ JOHN P. HEHMAN

The Order bore a stamp on its face: "FILED AUG 6 1987 JOHN P. HEHMAN, Clerk."

No. 86-1879

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

Robert G. Corace, Jr.,

Defendant-Appellant

ORDER

Before: KENNEDY and NELSON, Circuit Judges; and CELEBREZZE, Senior Circuit Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk

/s/ JOHN P. HEHMAN

The Order bore a stamp on its face: "FILED SEP 18 1987 JOHN P. HEHMAN, Clerk."

No. 86-1879

UNITED STATES COURT OF APPEALS

FOR THE SIXTH DISTRICT

Excerpt from transcription of
Oral argument held July 31, 1987

THE COURT: The court had considered this matter before argument but did wish to hear argument in the case. We find, however, that there is no error in the decision of the district court that the defendant was guilty of refusing to document employment and refusing to follow the probation officer's instructions. There was a basis upon which to revoke probation and we find no abuse of discretion in the court revoking it. The judgment of the district court is upheld. Thank you.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA

Plaintiff

v.

CRIMINAL NO. 84CR20429

Robert G. Corace, Jr.,

Honorable Julian Abele Cook, Jr.,

Defendant.

ORDER

This matter having come for hearing before the court on June 23, 1986, on allegations by the United States Probation Office for the Eastern District of Michigan that Robert G. Corace, Jr., defendant herein, violated the conditions of his release on probation, and the court having taken testimony and heard the positions of both parties, and otherwise being fully advised, the court finds as follows, for the reasons expressed in open court on June 23, 1986.

1. The defendant is guilty of violating condition of probation number three, that he work regularly at a lawful occupation and support his legal dependents to the best of his ability.

2. The defendant is not guilty of violating condition of probation number four, that he not leave the judicial district without permission.

3. The defendant is guilty of violating condition of probation number six, that he follow his probation officer's instructions.

As a consequence of defendant violating the foregoing conditions of probation, it is hereby ordered that defendant's probation is revoked effective July 25, 1986, and that he be

remanded to the custody of the Attorney General for eighteen months, that is, the unexpired portion of the sentence this court imposed on May 2, 1985. It is further ordered that defendant be released on a $25,000 unsecured bond, which bond shall be cancelled at 9:00 a.m. on July 25, 1986, or at the time defendant reports to the designated institution of confinement, whichever first occurs. It is further ordered that defendant surrender himself to the United States Marshal, Miami, Florida, not later than 9:00 a.m. on July 25, 1986, or to the designated institution of confinement at the designated time, whichever occurs first.

27 Jun 1986

/s/
JULIAN ABELE COOK, JR.
United States District Judge

Approved as to Form:

ROY C. HAYES
United States Attorney

/s/
Lynn Helland
Assistant U. S. Attorney

/s/ KENNETH A. WEBB
Attorney for
Robert G. Corace, Jr.,

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA

Plaintiff

v. CRIMINAL NO. 84CR20429

Robert G. Corace, Jr., Honorable Julian Abele Cook, Jr.,

Defendant.

EXCERPT FROM TRANSCRIPT OF HEARING HELD ON JUNE 23, 1986.

THE COURT: The Defendant Robert G. Corace, Jr., was found guilty by a jury on five counts of mail fraud and six counts of false statements on March 14, 1985.

Shortly thereafter, this Court placed Mr. Corace in the custody of the Attorney General for a period of two years on Counts 1 through 5. However, the Court suspended the sentence on all but the first six months. The Court also committed the Defendant to the custody of the Attorney General for a period of two months on counts 6 through and including 11 and suspended all but the first six months of that sentence.

MR. HELLAND: Excuse me, Your Honor. The Court said he was placed in the custody of the Attorney General for two months. I think it's probably two years.

THE COURT: Two years. Thank you. Two years.

Thereafter, the Defendant, after having served six months in custody, specifically the Federal prison camp in Duluth, Minnesota, was released with instructions to report to the U.S. Probation Department in Miami, Florida. This was done ostensibly because of the Defendant's assertion that he was a resident of that district. Pursuant to a cooperative inter-

change between and among probation departments, the Probation Department in Miami, Florida accepted voluntary supervision of Mr. Corace for the remainder or the duration of the probationary period. Contact was established by the Miami, Florida Probation Department with the Defendant in an ostensible effort to secure the requisite information that is sought by probation officers. As reflected by the correspondence to the Court and by the testimony of Raymond Frank, the Government's sole witness, difficulties arose which has resulted in the Miami, Florida Probation Department rejecting any further involvement over the Defendant and returning the supervisory control to this district.

On the basis of the assertions by Miami, Florida, and after an apparent verification of the validity of the assertions, the Probation Department in this district issued three violations. Specifically, the Probation Department has cited the Defendant for violation of three conditions of his probation.

Condition number three states:

> "You shall work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. When out of work, you shall notify your probation officer at once. You shall consult him prior to job changes."

In addition, the Probation Office of this district has cited the Defendant to violation of condition number four, which reads:

> "You shall not leave the judicial district without permission of the probation officer."

And, finally, the Probation Department of this district has cited Mr. Corace's alleged violation of condition number six; to wit:

> "You shall follow the probation officer's instructions."

With regard to the alleged violation of condition number three, there is evidence that the Miami, Florida Probation Office sought or was unable to determine the source of Mr. Corace's income and, specifically, the names and identities of the person or the persons for whom Mr. Corace allegedly worked.

There is further evidence that Mr. Corace refused to provide any information regarding his employment and/or his earnings to the Miami, Florida Probation Office—officer.

With regard to the alleged violation of condition number four, there is evidence that he has been in three localities. One is in Duluth, Minnesota, where he had been retained involuntarily at the Federal prison camp until his release in October, 1985. Thereafter, he removed himself, with the knowledge of the penal authorities, to the state of Florida and, specifically, the city of Miami, where presumably he has continued to reside. And the other community is in the area of Detroit, Michigan, where Robert Corace is physically located today.

It should be noted that in the violation of condition number four, there is evidence, which is supported by the statements of today, that Mr. Corace does not wish to relocate to the Eastern District of Michigan.

And, finally, with regard to the alleged violation of condition number six, the Miami, Florida probation officer has reported that he and his fellow probation officers have been unable to secure any form of cooperation from Mr. Corace. More specifically, they report that he had been instructed to contact a job placement officer in the Southern District of Florida and had been instructed to maintain a log of his daily activities. According to the information which has been provided to this Court, Mr. Corace has refused to comply with either of those directives.

The Court, in listening to the evidence and after reviewing the correspondence, including a letter from Mr. Corace dated June 5, 1986 and received by this Court on June 10, 1986, copies of which were furnished to the United States Attorney's Office and the Probation Office, it appears that there is a log jam which this Court can only resolve.

Probation is only one of the alternatives that is given to the sentencing judge. In many instances incarceration is the appropriate sanction that is imposed by the Court upon an offending individual. In some instances probation is the appropriate disposition of a sentence. In the latter, the sentence is—strike that.

In the latter, probation is imposed when the sentencing judge believes that the circumstances of the case warrant such relief. In other instances, in the so-called split sentence situation, incarceration and probation are formed as a hybrid sentence when the Court believes that it is appropriate to do so.

In the instant cause, this Court adopted the third alternative, namely; the split sentence. In imposing the sentence, the Court believed then, as it believes now, that a short period of incarceration was the appropriate disposition of the case. The Court also was aware that Mr. Corace at the time of the trial was a practicing attorney who had been and was at the time licensed to practice law in the state of Michigan. The Court also noted that during the course of the trial, that Mr. Corace had appeared on his own behalf and had acted as his own counsel. Additionally, the Court had noted that at no time during the course of the trial had Mr. Corace given this Court what may be described as a potential violation of the security of the court or of jeopardy to the community. This Court believed that Mr. Corace could and would act as a responsible citizen, though recognizing that Mr. Corace had continually and presumably still continues to profess his innocence of the charges with which he had been found guilty.

We come then to the—a situation where the Court must make a determination as to whether the Defendant has or has not violated the terms and conditions. The Court is prepared to render its decision with regard to those alleged violations.

With regard to violation of condition number three, this Court finds the Defendant guilty of violating that condition. More specifically, this Court has determined that the defendant Robert G. Corace, Jr. has failed to provide this Court or any duly representative thereof with information or documentation which would establish that he is working, quote, regularly at a lawful occupation and provides support for his legal dependents. There has been no evidence that if Mr. Corace is out of work, that he has notified his probation officer either in the Eastern District of Michigan and/or the Southern District of Florida with this information. Thus, this Court believes that the Govern-

ment has established its burden of proof beyond any reasonable doubt.

With regard to the charge of violation of condition number four, which addresses the Defendant's leaving the judicial district without permission of the probation officer, this Court finds the Defendant Robert G. Corace, Jr. not guilty. The removal of the Defendant from the jurisdiction of this Court has been with the knowledge, albeit indirect, of this Court. The Court finds no willful or known violation of the Defendant on this score.

With regard to the alleged violation of condition number six, to wit: "You shall follow the probation officer's instructions," this Court finds the Defendant Robert G. Corace, Jr. guilty of this offense.

In summary, the Defendant [sic] has found the Defendant Robert G. Corace, Jr., guilty of violating conditions number three and six, respectively.

The Court now turns to the sentence that is to be imposed. The violations of these sentences can be described as technical. They involve reporting or disclosure of information. If one is to be left free from the custody of the Attorney General, then this Court believes that the Defendant has a responsibility to comply with what may be described as reasonable impositions by the probation officer, which will assure the Court and the community in general that the defendant is not an obligation or a blunt on society, but can and will abide by the laws in the form of a lawful occupation and the like.

One may assume—that is only an assumption—that Robert G. Corace, Jr. is employed in a gainful manner, but this Court does not know this. One may assume that he has failed to follow the probation officer's directions and instructions because of an honest belief that the request is oppressive. But whether or not the resistance is honestly believed or whether it is an act of defiance, this Court does not know, except one thing: Mr. Corace has indicated that he'll not remove himself from the judicial district of—I mean, from the Southern District of Florida.

Ordinarily, the sentence that this Court would impose—strike that.

Ordinarily, the offenses would not warrant the sentence that is being imposed, but it does appear, as the counsel for the Government has suggested, that Mr. Corace is attempting to force the Court to impose an unsupervised probation and is on a head-long collision course with the Court.

The Court had given a trust to Mr. Corace. It appears that Mr. Corace has violated that trust. And, thus, the Court is now, with reluctance, obliged to, under the circumstances, impose a sentence upon Mr. Corace which will return him to the custody of the Attorney General for the balance of his two-year term.

The Court notes that Mr. Corace was or is a practicing attorney who could have sought the assistance of the Court in the event that there was an alleged abuse of discretion by the probation officer of this district or the Southern District of Florida. No steps have been taken, except absolute refusal. This, in the judgment of the Court, is a defiance which will not be tolerated by the Court. Thus, the sentence is imposed and the Defendant is placed in the custody of the Attorney General for the balance of his original two-year term.

If the Defendant wishes to ameliorate or mitigate against this sentence, then an appropriate petition may be filed with the Court. All right.

MR. HELLAND: Thank you, Your Honor.

UNITED STATES DISTRICT COURT
FOR
EASTERN DISTRICT OF MICHIGAN

U.S.A. vs. Robert G. Corace, Jr.

Docket No. 84-CR-20429-DT-01

Petition for Probation Action

COMES NOW Raymond L. Frank, Jr., PROBATION OFFICER OF THE COURT presenting an official report upon the conduct and attitude of probationer Robert G. Corace, Jr., who was placed on probation by the Honorable Julian Abele Cook, Jr., sitting in the court at Detroit, MI, on the 2nd day of May, 1985 who fixed the period of probation supervision at three (3) years, and imposed the general terms and conditions of probation theretofore adopted by the court and also imposed special conditions and terms as follows: Custody of the Attorney General for a period of 2 years on counts one through five. The sentence was suspended except for the first 6 months and each count was to run concurrent to the other. In addition, he was sentenced to 2 years custody on each of counts six through eleven but the sentence was suspended except for the first 6 months and these sentences were to run concurrent to each other and to the sentences imposed on counts one through five. He was ordered to surrender on June 3, 1985, to serve the custody portion of the sentence which was to be followed by 3 years probation.

RESPECTFULLY PRESENTING PETITION FOR ACTION OF COURT FOR CAUSE AS FOLLOWS:
(If short insert here; if lengthy write on separate sheet and attach)

ALLEGED VIOLATIONS:

1) Violation of condition number three, "You shall work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. When out of work you shall notify your probation officer at once. You shall consult him prior to job changes."

In a letter dated February 6, 1986, the U.S. Probation Department for the Southern District of Florida advised that Mr. Corace told them that he was the sole investor in a corporation named Cerberus Corporation that was involved in doing legal research for various attorneys in the Miami area. However, Mr. Corace refused to disclose the names of any of the attorneys or any other information concerning his employment. He advised that he did his legal research in local law libraries and refused to disclose any further information regarding his employment activities or his earnings.

2) Violation of condition number four, "You shall not leave the judicial district without permission of the probation officer."

Mr. Corace was sentenced in the Eastern District of Michigan. However, he was allowed to return to Miami, Florida upon his release from the Federal Prison Camp in Duluth, Minnesota. Jurisdiction of the case remained in the Eastern District of Michigan until such time that the Southern District of Florida accepted transfer of supervision and jurisdiction. Because of Mr. Corace's refusal to comply with the conditions as interpreted by the Southern District of Florida, that district will not accept the case for supervision. Mr. Corace advises that he wishes to maintain residence in Florida and does not wish to relocate to the Eastern District of Michigan.

3) Violation of condition number 6, "You shall follow the probation officer's instructions."

During Mr. Corace's stay in the Southern District of Florida, he was instructed to contact the job placement officer in that district. He refused to do so. In addition, he was instructed to maintain a log of his daily activities as he would not reveal any information regarding his employment activities or his means of support. He refused to maintain said log.

On February 25, 1986, Mr. Corace contacted the writer by telephone and indicated that he had been ordered to return to the Eastern District of Michigan. He did not feel that he was being treated the same as other individuals. He felt that the conditions of probation in the Southern District of Florida were unreasonable and were not those issued by Judge Cook.

The writer then contacted Supervising U.S. Probation Officer Richard Miklic in the Southern District of Florida who agreed to re-evaluate the defendant's case for possible transfer to the Southern District of Florida.

In a letter dated April 4, 1986, Mr. Miklic advised Mr. Corace continued his refusal to comply with the instructions given to him. He did not contact their office within the specified time allowed and did not return a personal financial statement, a business financial statement, or a statement regarding his employment. He did not submit written monthly reports as he was ordered to do nor was the Southern District of Florida ever able to contact him at his place of residence, "aboard the Amazing Grace". They contacted the marina at which the defendant's boat was kept and the marina office indicated that they have no record of the defendant staying there.

PRAYING THAT THE COURT WILL ORDER ISSUANCE OF A SUMMONS FOR A SHOW CAUSE HEARING TO DETERMINE WHY PROBATION SHOULD NOT BE REVOKED. SAID HEARING TO OCCUR ON JUNE 23, 1986, AT 3:00 P.M.

Order of court

Considered and ordered this 19th day of June, 1986 and ordered filed and made a part of the records in the above case.

/s/ _____
U.S. District Judge

Respectfully,

/s/ _____
Chief Probation Officer

Place: Detroit, Michigan

Date: June 19, 1986

Though dated June 19, 1986, the form was not entered on the docket until July 3, 1986.

(2)

Supreme Court, U.S.
FILED
JAN 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-815

In the Supreme Court of the United States

OCTOBER TERM, 1987

ROBERT G. CORACE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

SHELLEY A. LONGMUIR
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

14 pp

QUESTIONS PRESENTED

1. Whether petitioner received constitutionally adequate notice of the scope of his probation revocation hearing.

2. Whether petitioner's probation was properly revoked for his refusal to comply with certain instructions from probation officers.

3. Whether petitioner's right to confront and cross-examine witnesses was violated by the admission of hearsay at his probation revocation hearing.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-815

ROBERT G. CORACE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of the court of appeals (Pet. App. 1) is reported at 825 F.2d 412 (Table).

JURISDICTION

The judgment of the court of appeals was entered on August 6, 1987. A petition for rehearing was denied on September 18, 1987. The petition for a writ of certiorari was filed on November 17, 1987. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on five counts of mail fraud, in violation of 18 U.S.C. 1341, and six counts of making false statements to the government, in violation of 18 U.S.C. 1001. He was sentenced to two years' imprisonment, all but six months of which was suspended. He was also placed on probation

for three years following the term of imprisonment, and he was fined a total of $2,500. After serving his six-month sentence, petitioner began his term of probation in October 1985 (C.A. App. 63). On June 23, 1986, following a hearing, the district court concluded that petitioner had violated conditions of his probation and sentenced him to imprisonment for the remainder of his two-year term (Pet. App. 6-10). The court of appeals affirmed (Pet. App. 1).

1. Petitioner's probation was subject to a number of conditions. Three are relevant to this case. Condition 3 stated: "You shall work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. When out of work, you shall notify your probation officer at once. You shall consult him prior to job changes." Condition 4 stated: "You shall not leave the judicial district without permission of the probation officer." Condition 6 stated: "You shall follow the probation officer's instructions." Pet. 4; Pet. App. 7.

When petitioner was released from prison in October 1985, he requested permission to move to Miami, where he had lived previously and had hope for employment. That permission was granted even though petitioner's probation officer was based in Detroit. C.A. App. 55, 60-61, 66, 96-97, 104. The Miami probation office agreed to perform a "pre-transfer investigation" to determine whether to accept a permanent transfer of supervision from the Detroit office and, as a courtesy to the Detroit office, to supervise petitioner until the investigation was complete. *Id.* at 63-64, 67. Under this arrangement, petitioner continued to be officially under the supervision of his Detroit probation officer (*id.* at 66).

Petitioner refused to cooperate with the Miami probation office's efforts at supervision (Pet. App. 9-11; C.A. App. 72-74). He refused to provide any documentation to confirm his residency (C.A. App. 72). More important, he refused to furnish any information that could verify his

employment, even though he was instructed to do so. Petitioner, who is a Michigan attorney suspended from practice, merely asserted that he was employed doing legal research. He said that he roamed from one law library to another, and he gave only the name of a company with which he claimed to be associated. He refused to provide any further information, including the names of any attorneys for whom he did research. Pet. App. 7-8; C.A. App. 87. In addition, petitioner refused to file financial forms, to keep daily logs of his activities, or to contact a job placement officer, as he was directed to do (C.A. App. 28, 73-74, 84-85, 87, 105-107).

Because of petitioner's refusal to cooperate, the Miami probation office on February 6, 1986, instructed him to report to Detroit (C.A. App. 22, 73). Petitioner was warned that his failure to report would be considered a probation violation (*id.* at 22). Based on the intercession of the Detroit office, however, the Miami office gave petitioner another chance to comply with its supervision requests. When the Miami probation officer subsequently asked petitioner to report for a meeting (*id.* at 74-77), petitioner responded with a letter that challenged the various instructions described above and purported to set the terms under which he would agree to be supervised (*id.* at 27-31). Two days later, on April 9, 1986, the Miami probation office informed petitioner by telephone that it had decided not to accept a permanent transfer of supervision from the Detroit office because of petitioner's failure "to comply with the instructions of this office" (*id.* at 22, 32, 74-78). The Miami office then wrote a letter to the Detroit office returning full supervisory control to that office (*id.* at 77-78, 104).

On April 18, 1986, petitioner received a letter from his Detroit probation officer. The letter stated that the Miami office had reported petitioner's refusal to "abide by the conditions of probation as set forth by the Probation

Office in the Southern District of Florida." The letter instructed petitioner to return to the Eastern District of Michigan by June 2, 1986, and it warned him that failure to comply might result in probation revocation. See C.A. App. 19, 88.

Petitioner refused to comply with the Detroit officer's instructions (C.A. App. 83, 48). Instead, on June 5, 1986, petitioner sent a letter (with attachments) to the sentencing court in the Eastern District of Michigan (*id.* at 19-26). The letter asserted that the Miami probation office's instructions to him "from the outset" had "exceeded both the spirit and the letter of the terms of [his] probation" (*id.* at 21); it acknowledged that "my resistance of what I consider unlawful directions of my probation officers may lead to my re-incarceration" (*id.* at 20); and it explained that, in his view, the Miami office's overreaching legally justified his refusal to move back to Detroit as he had been ordered (*id.* at 20, 24). The letter also expressed petitioner's willingness to appear in Detroit "for any hearing the Court shall desire to conduct * * * to determine whether there has been a 'violation of probation' " (*id.* at 25).

The court responded by instructing petitioner to report on June 23, 1986, for "disposition of the matters raised and related in" the June 5 letter from petitioner (C.A. App. 34 (petitioner's June 18, 1986, letter of acknowledgement)). On June 19, 1986, the Detroit probation office filed a letter with the court alleging that petitioner had violated Condition 3, in that he had refused to prove his employment; Condition 4, in that he would not return to Detroit, which retained official jurisdiction over petitioner; and Condition 6, in that he refused to follow the Miami probation office's instructions. Pet. App. 12-14.

2. At the start of the probation revocation hearing, petitioner, having seen the June 19th letter, informed the court that he saw little need for the government to put on

its proof because he had "admitted the facts upon which this hearing is based" (C.A. App. 56-57, 58). But petitioner and the government could not agree to a stipulation of facts, so the government put on its case. The Detroit probation officer was the sole witness for the government. Letters and communications from the two probation offices and from petitioner were introduced to support the government's claim of probation violations. The government observed that petitioner "has not really challenged most of the violations that are alleged" (*id.* at 101) and argued that probation revocation was the only proper remedy, because unsupervised probation was inappropriate, the Miami office had declined supervision, and petitioner flatly refused to relocate to Detroit (*id.* at 102-103). The government attorney explained that return to custody was the only proper alternative. As the government attorney explained (*id.* at 103), "we don't request that except as a last resort, but I almost think [petitioner] is pushing that on the Court."

Petitioner presented no witnesses or evidence, but asserted a "[l]egal defense" (C.A. App. 97). He claimed that the issues other than his refusal to relocate were mere "makeweight" (*id.* at 98) and "beg[ged] the question" (*id.* at 100) and that the fundamental issue was the Miami office's authority to refuse to accept supervision and to "control a probationer's domicile" (*ibid.*). On that issue, petitioner argued, the Miami office had acted beyond its legal authority.

After a review of the evidence, the district court found (Pet. App. 6-11) that petitioner had violated two of the three probation conditions at issue in the proceeding. First, the court found that petitioner had violated Condition 3, which required that he be employed or, if not, that he inform his probation officer. After noting petitioner's refusal to supply any information that could confirm his alleged employment doing legal research (*id.* at 7-8), the

court found that petitioner had failed to adduce any evidence at all that he was working regularly and supporting his dependents or, if he was out of work, that he notified any probation officer of that fact (*id.* at 9-10). Second, the court found that petitioner had violated Condition 6, which required obedience to probation officers' instructions, because petitioner had refused to comply with a number of specific directives of the Miami probation officers and, more generally, had been uncooperative (*id.* at 8, 10).[1] Although noting that these violations might be thought "technical" (*id.* at 10), the district court observed that petitioner was "attempting to force the Court to impose an unsupervised probation and is on a headlong collision course with the Court" (*id.* at 11). Because of petitioner's "defiance" (*ibid.*), the court revoked his probation and ordered him returned to the custody of the Attorney General for the remainder of his original two-year sentence (*ibid.*). The court of appeals affirmed on the district court's opinion (*id.* at 3).

ARGUMENT

Petitioner raises three fact-specific challenges to his probation revocation. No published decision is presented for this Court's review. The court of appeals' rejection of petitioner's arguments is correct and does not conflict with any decision of this Court or of any other circuit. Review by this Court is therefore unwarranted.

1. Petitioner first contends (Pet. 10-13) that he did not receive constitutionally adequate notice of the scope of the hearing held on June 23, 1986, because he did not know that Conditions 3 and 6 would be at issue. But petitioner,

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[1] The court found that petitioner had not violated Condition 4, which required that he not leave the judicial district without permission. The court observed that, although petitioner refused to return to Detroit, he went to Florida with the court's knowledge (Pet. App. 10).

who received the June 19th letter specifying the charged probation-condition violations before the hearing began, did not complain about inadequate notice prior to or at the hearing. He asserted that the allegations concerning Conditions 3 and 6 were "makeweight" and "beg[ged] the question" (C.A. App. 98, 100), but he never suggested that any of the allegations came as a surprise or could not lawfully be considered in the proceeding, or that he was unprepared to respond to them. Indeed, at the outset of the hearing, petitioner, having read the allegations, expressed no objection to their inclusion in the proceeding and stated that he had already admitted the truth of the factual allegations and saw no need for the government to put on proof (*id.* at 56-58).

In any event, as his failure to raise the notice issue at the hearing indicates, petitioner had adequate notice of the three issues that were resolved in the revocation hearing. Petitioner's own letters preceding the hearing specifically complained about the allegedly oppressive instructions of the Miami probation officers, including their request for a detailed financial history and for a daily log of his activities (see C.A. App. 19-26, 27-31). Although petitioner might have believed that the revocation hearing would focus on his refusal to return to Detroit, the pre-hearing communications made clear that the hearing was to address all of the incidents manifesting petitioner's refusal to cooperate with the Miami office's efforts at supervision. In addition, petitioner has not identified any way in which he was prejudiced by the alleged lack of adequate notice. Not only has he never disputed that he was guilty of the probation-condition violations, but he has never pointed to any evidence or arguments that he was prevented from putting forth by the alleged inadequacies in the notice he received.

2. Petitioner also contends (Pet. 18-21) that it was a violation of his due process rights for the district court to

revoke his probation based on his refusal to follow the directives of the Miami probation office. Those directives, however, were entirely proper. The Miami office's orders concerning verification of employment, daily logs of activity, and contact with a job placement officer were issued as a result of petitioner's evasion of questions concerning his employment. Moreover, they were entirely reasonable means of implementing his probation conditions—notably, Condition 3, that petitioner work regularly or report to the probation officer if he is not working. The probation order in this case, by requiring petitioner to follow the instructions of his probation officer (Condition 6), obviously contemplated that further instructions would be given to implement the express terms of the probation order and to maintain effective supervision. Probation officers have traditionally been entrusted with broad discretion and power to supervise probationers in their rehabilitation (*Griffin* v. *Wisconsin*, No. 86-5324 (June 26, 1987), slip op. 5-6; *Gagnon* v. *Scarpelli*, 411 U.S. 778, 784 (1973)), and financial reporting requirements are important and common probation conditions. See, *e.g.*, *United States* v. *Rodgers*, 588 F.2d 651, 653 (8th Cir. 1978); *United States* v. *Pierce*, 561 F.2d 735 (9th Cir. 1977), cert. denied, 435 U.S. 923 (1978).

It was likewise proper for the district court to revoke petitioner's probation for refusing to comply with the Miami office's instructions, for such defiance constituted a violation of the probation condition requiring that petitioner follow his probation officers' instructions. See *United States* v. *Babich*, 785 F.2d 415, 418 (3d Cir. 1986), cert. denied, No. 85-6893 (Oct. 6, 1986) (failure to fulfill reporting requirement is sufficient to revoke probation); *Higdon* v. *United States*, 627 F.2d 893, 900 (9th Cir. 1980) (revocation of probation for noncompliance with reporting requirement); *United States* v. *Rodgers*, 588 F.2d at 653-654 (same). Petitioner's refusal to comply with the in-

structions concerning verification of his employment status also left the court with no choice but to conclude that petitioner had violated the condition requiring that he be employed or report his unemployment to his probation officers. Moreover, contrary to petitioner's suggestion (Pet. 20), petitioner had ample notice, as we have explained, that his defiance of the Miami office's directives might lead to probation revocation, and not merely to the Miami office's refusal to accept supervision of petitioner. See C.A. App. 19, 25, 88.

3. Finally, petitioner challenges (Pet. 13-18), as a denial of his Confrontation Clause rights, the admission at the probation-revocation hearing of certain letters from the Miami probation officers to the Detroit probation officer. This claim is without merit.

In *Morrissey* v. *Brewer*, 408 U.S. 471, 489 (1972), and *Gagnon* v. *Scarpelli*, 411 U.S. at 782-783 n.5, 789, this Court held that the process due at a revocation hearing was not to be equated with that due at a criminal trial and, in particular, that "the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial" (*Morrissey*, 408 U.S. at 489). See also Fed. R. Evid. 1101(d)(3) (hearsay evidence admissible at probation hearing); Fed. R. Crim. P. 32.1(a)(2) advisory committee note ("the usual rules of evidence need not be applied" and court may consider documentary evidence including letters that would not be admissible in a criminal trial). The lower courts are in agreement that hearsay evidence is admissible if, in the circumstances of a particular case, it is demonstrably reliable. See, *e.g.*, *United States* v. *McCallum*, 677 F.2d 1024, 1026-1027 (4th Cir.), cert. denied, 459 U.S. 1010 (1982); *Prellwitz* v. *Berg*, 578 F.2d 190, 191-193 (7th Cir. 1978); *United States* v. *Pattman*, 535 F.2d 1062, 1063-1064 (8th Cir. 1976); *United States* v. *Miller*, 514 F.2d 41, 42-43 (9th Cir. 1975).[2]

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[2] *United States* v. *Bell*, 785 F.2d 640 (8th Cir. 1986), which petitioner cites as in conflict with the decision in this case, articulated the

The letters from the Miami probation office were demonstrably reliable and were well within the bounds of the hearsay statements found admissible in the cases cited above. Like the police reports in *United States* v. *Bell*, 785 F.2d 640 (8th Cir. 1986), the letters of the Miami probation officers were corroborated by the letters and admissions of petitioner. Petitioner's letters showed that the probation officers had failed to verify his residence and that he had refused to provide documentation (C.A. App. 72); that he could not be contacted during the day at work (*id.* at 36, 87); that he refused to return to Michigan when he was instructed to do so (*id.* at 20, 25, 83); that he refused to file financial verification reports and daily logs as instructed (*id.* at 28); that he refused to give probation officers any information about his employment other than the name of the corporation through which he allegedly did business (*id.* at 87); and that he failed to meet with the officers when they requested a meeting (*id.* at 75-76). Neither at the hearing nor in this Court has petitioner advanced any reason to doubt the reliability of the charges made in the Miami office's letters. Indeed, petitioner stated at the outset of the probation-revocation hearing that he did not dispute the factual allegations in the petition for revocation, which included all the allegations on which the eventual revocation decision was based.

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same principle in the passage that petitioner quotes (Pet. 16) and expressly permitted the admission of hearsay evidence (police reports) that it found reliable (785 F.2d at 644). And *United States* v. *Cain*, 615 F.2d 380 (5th Cir. 1980), also cited by petitioner (Pet. 16), involved a criminal trial, not a revocation proceeding. The courts have had no difficulty distinguishing reliable from unreliable hearsay on the particular facts presented to them.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

CHARLES FRIED
Solicitor General
WILLIAM F. WELD
Assistant Attorney General
SHELLEY A. LONGMUIR
Attorney

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